Report by the Inspector-General of Intelligence and Security: "Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001 – 2009"

Response by Dr Warren Tucker, CNZM, Director GCSB 1999 – 2006 and Director NZSIS 2006 – 2014 Monday 9 September 2019

This report on the "Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001 – 2009" by the Inspector-General of Intelligence and Security concerns the potential for the NZSIS and GCSB to have been complicit in acts of torture or cruel, inhuman or degrading treatment or punishment of detainees, specifically in relation to the CIA's programme. The Inspector-General's most significant finding is that

> **"The NZSIS and the GCSB, the then Directors, and individual agency staff members had no direct involvement in the CIA's unlawful activities; nor were they complicit in any unlawful conduct.**"

The report itself repeats and exemplifies this. **The Inspector-General is satisfied that neither the Agencies, nor the former Directors, nor any staff member breached the law. Nor were they in any way complicit in any breaches. They were not directly involved or complicit in the rendition of individuals, the detention of individuals, or the torture or any kind of maltreatment of any individuals.**

This is hardly surprising – and by no means an accident. Torture is abhorrent. No former Director would have countenanced involvement in it. Nor did any former Director cause the Agencies to engage in activities entailing any real risk of involvement in it. Indeed, the report records that the former Directors of GCSB and NZSIS over this period "cooperated fully with [the] Inquiry", and that they "carried out their roles with professionalism and integrity. All of them expressed their abhorrence of the use of torture in strong terms. They made significant individual contributions at the time they were agency Directors …".

Even so, the Inspector-General reaches a number of conclusions and findings to the effect that the former Directors didn't do enough. This is based on a series of propositions, all of which I emphatically reject, and which therefore require a response.

The Inspector-General finds that the GCSB **may have** provided intelligence which assisted or contributed to the CIA programme, but that it is not known whether in fact this occurred. She does concede that, even if it had, that "would have been a step distant from any kind of direct involvement". She also finds, with the benefit of hindsight – relying upon information made available much later by the US Senate Report of 9 December 2014 - that both Agencies "received and retain intelligence reports arising from the interrogation of

individuals under the CIA programme", while noting that there was nothing contained in those reports which indicated or even hinted at the nature of the interrogation or the treatment of those detainees. She also acknowledges that the NZSIS was not aware at the time that the detainee interrogations involved torture.

Her principal criticism is that, as a result of public allegations of mistreatment by the CIA, the former Directors of GCSB and NZSIS **should** have been aware of the CIA programme by mid-2004 at the latest, and as a result, **should** have been "clearly on notice … to make their own inquiries and assessments" of those allegations. She finds that the then Directors "**ought to have made their own inquiries and conducted a rigorous and independent assessment … , notwithstanding the denials and assurances of the U.S. agencies and the US government"** [emphasis added]**.**

Further, "the then Directors of GCSB and NZSIS **did not at the time adequately identify the potential legal and reputational risks** for their organisations and the Government from engaging with the CIA, as an intelligence partner" [emphasis added]. She has said that the Directors **should** have taken steps to raise concerns about the CIA programme either formally or informally with the CIA or the US government. The Inspector-General has also sharply criticised the former Directors for what she has described as a disproportionate focus on operational imperatives, at the expense of New Zealand's human rights law and values, and a failure of their "fundamental obligation to monitor, assess and protect their organisation from legal and other risk". She says that "Events in respect of Al Qa'ida and Afghanistan raised an undoubtedly complex, unfamiliar, and evolving operational context, **but nevertheless more was required of the Directors to ensure their agencies had a conscious and prudent approach to organisational risks of the kind at issue here."** [emphasis added.]

Finally, the Inspector-General is highly critical of the training and support provided to GCSB staff deployed in or otherwise engaged in intelligence activity in respect of Afghanistan, and in particular the lack of detailed "policies or procedures relating to GCSB's human rights obligations, and the role of civilians, in a military environment working to support military operational objectives". She states elsewhere that "**during the relevant period there should have been more focus on New Zealand's human rights obligations**, in agency policies, training, and engagements (at all levels) with Five Eyes counterparts" [emphasis added].

I was Director/Chief Executive of the GCSB from December 1999 until September 2006, and Director of Security/Chief Executive of the NZSIS from November 2006 until April 2014, so have a unique insight into (and responsibility for) those Agencies during the period of this inquiry. Along with my fellow former Directors of the time, I take strong exception to the Inspector-General's critical inferences and judgements.

First, however, some context is needed to set the scene.

The New Zealand intelligence and security agencies, NZSIS and GCSB, were ill-prepared to face the challenges arising for New Zealand in the immediate aftermath of the terrorist attacks on the US mainland on 11 September 2001. Both Agencies were small – tiny, by today's standards – and only beginning to recover from capability and capacity issues resulting from the shrinking budgets of the 1990s. New Zealand was still very much subject to the intelligence cutbacks and constraints imposed unilaterally by the 1985 US Presidential Directive following the ANZUS rift. Although there had been some minor relaxation – "re-interpretation" – by the US when it suited their interests, most sharing of intelligence reporting - and the technology and "know-how" which underpins intelligence collection capability - was on a "Four Eyes" basis. New Zealand was essentially a member of the "Five Eyes" grouping mostly in name only.

New Zealand also had other security concerns closer to home than Afghanistan, the Middle East, and international terrorism. We were engaged with Australia in seeking stability in several near neighbour countries, which even today I am constrained from naming. In these conflicts or stabilisation missions New Zealand invested heavily in deployed NZDF and other personnel, and expended political and diplomatic capital as well as funding. These engagements, commitments and investments by New Zealand demanded – and received – substantial intelligence support from the GCSB and (albeit to a lesser extent) the NZSIS.

In December 2001 New Zealand joined the emerging international coalition and deployed an NZDF SAS contingent to Afghanistan. Other deployments of NZDF personnel followed shortly after. Over time, the focus of the effort there shifted from conflict to ensuring stability, with New Zealand assuming leadership of the Provincial Reconstruction Team in Bamyan, central Afghanistan, in September 2003. It is important to recall that throughout this time the theatre of operations across Afghanistan was underpinned by a succession of UN Security Council resolutions, and operated in accordance with internationally agreed Rules of Engagement.

The nature of the conflict with the Taliban in late 2001 and throughout 2002 immediately raised a range of highest priority intelligence requirements in relation to threats to life and to the mission to which the New Zealand Government of the day had committed.

It is important to understand that the Agencies do not set their own requirements for intelligence collection. They are instructed as to Government's requirements for intelligence, and are expected to do their utmost to address those of highest priority. These Governmental requirements and their priorities were then, as now, developed under an interdepartmental system headed by the Department of the Prime Minister and Cabinet. This system, and the framework under which the requirements were established, were formally approved at Ministerial level.

Many of Government's requirements for information and intelligence arising from the conflict with the Taliban in late 2001 and throughout 2002 were categorised as "of paramount importance". This cast a duty upon the Agencies to make determined and strenuous efforts to fulfil these requirements.

This raised a significant dilemma. Neither NZSIS nor GCSB had any intelligence collection capability in relation to Afghanistan, or the infrastructure to develop their own independent capabilities. But the relevant intelligence which the other Five Eyes partners were generating and rapidly ramping up was being mostly shared on a Four Eyes basis which excluded New Zealand.

The solution to this dilemma required that the GCSB (initially) and the NZSIS (later), with the full agreement and active encouragement of key Ministers, offer to work closely with its US, UK and other counterparts. This included putting a very small number of its own personnel into coalition intelligence facilities on the ground in Afghanistan, and was consistent with New Zealand's obligations under UN Security Council Resolutions 1368 (2001) and 1373 (2001) to cooperate to combat terrorism. By doing so, these dedicated men and women could act as New Zealand's "eyes and ears" close to the conflict. They could assist in making available the relevant intelligence flows, and would be (and be seen to be) an active and useful practical contribution to the partnership intelligence effort. Without going into any detail, I can affirm that this approach paid off for New Zealand, and resulted in critical and high-value intelligence becoming available. It also enabled access to important tactical capabilities which undoubtedly saved the lives of New Zealand soldiers. As the Inspector-General has noted, in her classified report, these men and women did indeed make a well-regarded and valuable contribution to the wider coalition mission in Afghanistan, as well as supporting more directly New Zealand's endeavours there.

The challenges in relation to conflict in Afghanistan, and in several near neighbour countries, were not the only security-related issues confronting the New Zealand Government at this time. International terrorism continued to be of significant concern, with bombing "spectaculars" in Madrid, London, and elsewhere during the early to mid-2000s. New Zealand was not immune to the range of security threats faced at this time by others, including notably Australia, as demonstrated by the bombings in Bali in October 2002, in which New Zealanders as well as Australians and citizens of 21 other countries were killed. The weight of responsibility felt by the intelligence and security agencies, and particularly their Directors, is felt especially keenly at such times of heightened threat and uncertainty. The impact of any such event on New Zealand soil has been graphically and tragically illustrated over the past few months, in the wake of recent events in Christchurch.

A further complication for the Directors during 2002 and early 2003 was the relentless move by the US and UK "coalition of the willing" towards their March 2003 invasion of Iraq, outside of any UN endorsement, and contrary to New Zealand Government policy. This raised further issues and risks for New Zealand, and especially for the GCSB and NZSIS, as we

needed to put in place a series of national "red flags" in our own intelligence collection and sharing, in order to ensure that we did not either directly or inadvertently contribute to this invasion which was contrary to New Zealand's foreign policy.

It is against this backdrop that the events and actions covered by the Inspector-General's report took place. She has chosen to summarise this in the following manner: "Events in respect of Al Qa'ida and Afghanistan raised an undoubtedly complex, unfamiliar, and evolving operational context, but **nevertheless more was required of the Directors** to ensure their agencies had a conscious and prudent approach to organisational risks of the kind at issue here" [emphasis added].

Before turning to the substance of the Inspector-General's criticisms of the former Directors of the NZSIS and GCSB, it is important to note that these Agencies do not exist or operate in isolation. The intelligence and security agencies operate within a governmental system, and their roles within it are clearly defined and controlled. Both agencies are highly connected to, influenced by, and controlled in a variety of ways as integral components of the national security system of the New Zealand Government.

Both Agencies have their own Acts (NZSIS since 1969, and GCSB since 2003). For NZSIS over the period of this report, the Minister in Charge was the Prime Minister, who was also the Minister Responsible for the GCSB.

The Directors were an integral part of, and reported to, ODESC, the Officials Committee for Domestic and External Security.

The principal functions of ODESC were to provide a "coordinated stream of policy advice to Ministers" in relation to national security issues and risks; to oversee intelligence policy and performance; and to lead the inter-departmental process for setting national intelligence priorities. At that time, ODESC comprised the Chief Executives of the Department of the Prime Minister and Cabinet (Chair), Ministry of Foreign Affairs and Trade, Ministry of Defence, and the Chief of Defence Force, as well as NZSIS and GCSB, with others brought in as appropriate.

As noted above, intelligence requirements were set by customer departments and approved at high level by Ministers – the Agencies were not self-tasking. Further, their operations were overseen by the Inspector-General of Intelligence and Security under legislation from 1996, and at the political level by the Intelligence and Security Committee of Parliamentarians – which comprised senior MPs from both sides of the House, including the Leader of the Opposition as well as the Prime Minister.

In addition to the regular formal meetings of ODESC, during my time as Director of GCSB and NZSIS I met regularly on a bilateral basis with a number of other Chief Executives and relevant senior officials, including most notably those of the Department of the Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade, Ministry of Defence, and the

Chief of Defence Force and other senior NZDF officers. I also had regular meetings and conversations – sometimes several times a week – with the Prime Minister as Minister in Charge/Minister Responsible for the Agencies.

Both Agencies were also subject to other forms of oversight and accountability too, including (in addition to the Inspector-General of Intelligence and Security) from the Ombudsmen, Privacy Commissioner, Controller and Auditor-General, and Chief Archivist.

At no point across the entire period covered by the Inspector-General's report (2001 to 2009) did any of these individuals or their organisations raise with me or with my fellow former Directors any suggestion that we should take steps to enquire, investigate, or raise with the CIA the possibility of human rights abuses of detainees, or about the CIA's rendition and detention programme. The Inspector-General identifies mid 2004 as the "tipping point" by which credible reports in the public domain "from respected NGOs and from established and reputable newspapers" should have triggered action by the former Directors to commence our own investigations of the CIA's activities. These reports and allegations were known also to Ministers and other senior officials including ODESC. It is ironic that at the very time this "tipping point" was reached (mid 2004), the New Zealand Government in April 2004 took the conscious and deliberate formal policy decision that any detainees captured by the NZDF in Afghanistan should be handed over to the US there. Instead of relying on the public reports emerging at that time, which are acknowledged explicitly in the official papers relating to that decision, Ministers chose to rely on the repeated official assurances of the then US Administration. These are the same official assurances which we are now being criticised by the Inspector-General for having relied on at that time.

There is a further, more fundamental point, in relation to the Inspector-General's criticism that we failed to either investigate, enquire, or raise the issue of human rights directly with the CIA. It is a long-standing and well-understood principle of intelligence sharing that the sources and methods used to acquire sensitive intelligence are strenuously protected. This is particularly true for human-sourced intelligence, where exposure of the source can often mean the loss of future intelligence (at best) or even the death of the source or agent. This did indeed happen to some agents of our international counterparts in Afghanistan. So, in the HUMINT world, sources and methods are for good reason jealously guarded by the originating agency. Any attempt by a receiving agency to learn more about the means by which intelligence has been obtained is met with closing doors, and a drying up of intelligence flows.

The Directors were under no duty whatsoever to risk that. To the contrary. New Zealand at that time was (and remains) by far the smallest partner and very much a net beneficiary of the Five Eyes arrangements. Intelligence flows had been only recently re-established after the cutbacks of the 1985 Presidential Directive and were still fragile. The impacts on our security of any compromise to those flows could have been catastrophic. More than that. It would have undermined Government's expectations that the Agencies make determined

and strenuous efforts to gather intelligence in accordance with Government's express priority requirements. It would have been completely antithetical to the Agencies' statutory duties to fulfil those requirements. It would also have been incongruous, given Ministers' reliance upon US assurances in taking the decision to surrender NZDF detainees to US forces.

The Inspector-General asserts that the former Directors were obliged to assess "what risks (legal, moral, reputational) those CIA activities involving torture posed for their own agencies and the New Zealand Government." She then acknowledges that at that point it was for Ministers to assess what the risk meant in practical terms for New Zealand's relationship with the United States. In doing so, the Inspector-General has minimised the fact that the public allegations of mistreatment and torture by the CIA were known also to others across Government at that time. She states that "the then Directors ought to have made their own inquiries and conducted a rigorous and independent assessment [of the public allegations], notwithstanding the denials and assurances of the US agencies and the US government." Significantly, this fails to recognise that, had they done so, the Directors would have risked compromises to intelligence flows, and so triggered the very results that, the Inspector-General rightly accepts, were for Ministers to decide. That would have been fundamentally contrary to our core responsibilities as State sector chief executives.

I also very much doubt that Ministerial decision-making would have been usefully informed by any assessment of "legal, moral, reputational" risks undertaken by the intelligence agencies alone. The intelligence agencies are not Government's providers of legal expertise in matters relating to human rights compliance. Nor are they the gatekeepers or guardians of national morality or national reputation. I consider it plain that any assessment of the kind the former Directors are criticised for not performing was an assessment that stood to be performed by a range of Government departments acting in concert. Further, it was for Ministers to determine how any such assessment should occur – including as to whether it would entail any questioning of US counterpart agencies that might risk vital intelligence flows.

I therefore take issue with the Inspector-General's finding that the former Directors were reluctant to raise uncomfortable issues with our overseas counterparts, either one-to-one, bilaterally, or in group discussion. This is a highly simplistic accusation. The question is not one of courage but one of constitutional propriety, given the roles and responsibilities of Ministers and of all the Government Departments comprising our national security system. Moreover, there were a number of situations over the period covered by this report when vigorous and robust discussion on matters relating to New Zealand's security interests could helpfully take place – without entailing significant risks – and that is exactly what happened, with the US as well as with other overseas counterparts.

The Inspector-General is critical of the Agencies (NZSIS in particular) for receiving and continuing to hold intelligence reports resulting from CIA detainee interrogations. In her full

(classified) report she is explicitly critical that the Service failed to review its holdings and subsequently expunge such reports once the nature of the CIA programme had been confirmed. Given the tenor of the rest of her report, I wonder whether, had we done so, she would now be criticising us for destroying evidence important to her inquiry, and finding us in breach of our legal obligations to retain such reports under New Zealand's archives legislation.

I take strong exception to the Inspector-General's finding that GCSB failed to adequately support its staff "deployed in or otherwise engaged in intelligence activity in respect of Afghanistan", and that GCSB and NZSIS did not adequately supervise deployed staff. It is true that, with the benefit of hindsight and experience, we could have done more. Of course. But I utterly reject the inference that we simply sent staff off into a conflict zone to work out for themselves what their role should be, and left them to get on with it unattended and unsupported. Further, the Inspector-General takes no account of the fact that a number of GCSB senior managers (including me on a number of occasions) visited our staff in theatre on a rolling basis over this period.

We were fortunate to have had a small number of excellent people who had prior experience serving in intelligence roles in conflict zones with the UK prior to joining GCSB. Torture or inhumane or degrading treatment of any individual was and is contrary to the values, ethos and culture of both the GCSB and NZSIS. These factors, together with first rate support from NZDF with pre-deployment training and on the ground in theatre, provided the foundation upon which more formal and detailed training, policies and practices were developed to support those less experienced staff who followed. Again, the Agencies were not self-tasking nor were they the only entities with responsibilities for the performance of our national security system and for managing the many and varied risks associated with providing national security. At the end of the day, the Agencies had clear statutory obligations to gather intelligence that vitally impacted New Zealand's national security, in accordance with Government's requirements. And the fact of the matter is that the steps the Directors implemented in discharging those obligations were sufficient to avoid any implication by any New Zealander in any act of torture.

This brings me, finally, to the wider point about risk.

I agree entirely with the Inspector-General in her statement that "All chief executives, whether in core Public Service departments, in the wider State Sector, or in private enterprise, have, in addition to their operational or business mandate, a fundamental obligation to monitor, assess and protect their organisation from legal and other risk". That is especially true for the leadership of operational organisations such as the NZSIS and GCSB. I emphatically reject the Inspector-General's position that any of the former Directors did not meet public sector standards for chief executives, or that we failed to meet the benchmarks of prudent public sector administration. We were acutely aware of all of our State sector responsibilities. Indeed, of all State sector chief executives, we (along with the

Commissioner of Police and the Chiefs of the military services) were unique at that time in that we stood to be dismissed by the Governor-General if we had lost the confidence of the Responsible Minister.

Intelligence operations, especially those involving staff deployed abroad or operating clandestinely, are inherently risky. Great care is taken to identify and mitigate those risks before any operation is approved. The Directors are constrained in what can be publicly said in this regard, but I do not for a moment accept that the intelligence **cooperation** activities we were engaged in with other Five Eyes partners were in any way "inherently risky", as the Inspector-General has claimed. Further, actions which jeopardise such "cooperation activities" raise their own set of risks, including that intelligence critical to New Zealand's security would be withheld. Given the fragility of the (then) recently restored flows of intelligence to New Zealand from the other Five Eyes partners, the risk that these flows would again be cut was especially real had we sought to challenge our US counterpart agencies directly, on the basis of media reporting against the repeated official denials from the US Administration. Such actions would have run directly counter to our most fundamental statutory obligations, and indeed our basic raison d'etre – to meet intelligence demands set by our Government. If – despite Government's decision to authorise the surrender of detainees to US forces – there was any duty anywhere within our national security system to raise issues concerning US activities, it did not lie within the Agencies or their Directors.

Organisational risk is complex, and often links to other forms of risk impacting wider national, political, or diplomatic interests. An operational failure (of action or omission) by an intelligence and security agency can cause significant political or diplomatic embarrassment to the Government as well as to the organisation itself. It can also result in very real adverse consequences for real people, with wider societal impacts for families and communities. That is one reason why, until recently, the Minister in Charge/Minister Responsible for the NZSIS and GCSB was traditionally the Prime Minister.

Legal risk is also often complex, especially when the legal issues involved are poorly articulated, untested in court, or contradictory and subject to differing or confused interpretations of precedence. The Inspector-General's report notes that MFAT is working with Crown Law, NZDF, and the intelligence and security agencies to "formalise a statement of New Zealand's obligations in relation to the law of torture and complicity in torture". Her report notes that the Inspector-General had attempted a formulation of these obligations, in the form of a Discussion Paper, but states that the need for this was overtaken by the interdepartmental efforts of these key, core Crown agencies. In fact, the Inspector-General's attempted articulation of the legal position attracted extensive and scathing criticism from within Government. This was the catalyst for the more concerted, whole of Government effort that is now occurring (and still incomplete).

I make this observation because it speaks volumes. Questions of legal risk arising from the law of torture and complicity in torture are keenly debated by academics, judges and jurists from around the world. In 2019 we are still to work out "New Zealand's obligations in relation to the law of torture and complicity in torture", even though in 2019 there is much more established international legal casework than was the situation fifteen years ago. Yet between 2001 and 2009 we former Directors took decisions that avoided any direct involvement in torture or complicity in torture. We did so despite having to manage a range of security risks unprecedented for New Zealand since the end of the Second World War.

I cannot therefore accept the criticisms of us former Directors, made by the Inspector-General in her report. She has failed to articulate the nature of the legal risk she claims we faced but did not address. For all that the Government might yet articulate a "New Zealand position" , informed by "New Zealand values", as to what are and are not acceptable activities for the New Zealand Agencies, there was no such position then and there is none still. The statutory duties of the Directors were to conform to human rights obligations recognised by New Zealand law, and we did exactly that.

Further, the Inspector-General has ignored the fact that, had we asked questions of the CIA relating to the officially-denied public allegations concerning the CIA programme, that would have risked incurring the result which she acknowledges would have required prior political consideration by New Zealand Ministers. She has mentioned the long-standing principle underpinning intelligence sharing, relating to the "need to know" principle which protects strenuously guarded sources and methods, but appears to think that this principle is less important than possible legal or reputational risks. And in identifying alleged shortcomings in meeting our responsibilities as State sector chief executives, she has paid inadequate attention to the Directors' actual statutory functions, and to the role we played as a component within the highly interconnected national security system of the New Zealand Government.